STATE OF MICHIGAN

COURT OF APPEALS

ST. JOSEPH MERCY OAKLAND, a/k/a TRINITY HEALTH MICHIGAN,

Plaintiff/Counterdefendant-Appellant,

v

DETROIT OSTEOPATHIC HOSPITAL CORPORATION, d/b/a BI-COUNTY COMMUNITY HOSPITAL, a/k/a HENRY FORD HEALTH SYSTEMS and ANDREA ABESSINIO,

Defendants/Counterplaintiffs-Appellees.

UNPUBLISHED
January 12, 2010

No. 286946
Oakland Circuit Court
LC No. 2004-059636-CK

Before: Fort Hood, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

In this indemnification and contribution action, plaintiff appeals as of right from a jury verdict of no cause of action in favor of defendants. We affirm.

On May 21, 1993, Ellen Le presented at plaintiff's facility complaining of vaginal discharge and spotting. She was pregnant with twins at the time. Then third-year resident Dr. Andrea Abessinio examined Mrs. Le. With the assistance of a nurse, Dr. Abessinio took fluid and blood levels. She also monitored the heart rate of the twins and noted their position. Both Dr. Abessinio and the nurse examined the fetal monitoring strips and concluded that Mrs. Le was not in labor. A resident did not have authority to admit a patient. Dr. Abessinio reported her findings to Mrs. Le's treating physician over the telephone, Dr. Indu Mital. Mrs. Le was not admitted to the hospital, but was discharged with instructions to be on bed rest and to see Dr. Mital in a week. Three days later, Mrs. Le prematurely gave birth to twins with severe birth defects, including cerebral palsy and deafness, at a different facility.

Mrs. Le filed suit on behalf of the minor twins in 2003, and plaintiff settled the lawsuit for $3.4 million dollars. As a result of that payment, plaintiff filed this action for indemnification and contribution. Specifically, plaintiff alleged that defendant hospital entered into an affiliation agreement to provide residents to work in plaintiff's facility. Defendant, Dr. Abessinio, was the resident placed in plaintiff's facility, and she treated Mrs. Le for her report of bleeding. The complaint asserted that all other allegations against the facility had been

dismissed before its settlement agreement with Mrs. Le, and therefore, the only theory of liability that remained was the alleged negligence by Dr. Abessinio. Consequently, plaintiff requested reimbursement for the settlement involving the acts or inaction by Dr. Abessinio.

Plaintiff presented testimony from its representatives and attorney, Julie McNelis, regarding the measures taken to gather information regarding the Le treatment and the defense of the action, including retention of experts to support the care rendered by Dr. Abessinio. Of the testimony presented, Susan Kawa, a former nurse and attorney employed by plaintiff as the director of liability claims, was particularly noteworthy. Although McNelis presented the case at a monthly review hearing, Kawa wanted the Le malpractice case to be reviewed by attorney Charles Fisher. She regarded Fisher as the authority in this area of medical malpractice, and McNelis had never acted as first chair in a birth trauma case. According to Kawa's notes, Fisher opined that the jury would question why the twins were monitored for such a short period of time. Even though Fisher opined that Mrs. Le was not in labor when she arrived at plaintiff's facility, the jury would likely see a connection to the birth three days later. Additionally, Fisher thought that Dr. Abessinio was a poor and overweight witness. He concluded that there was less than a 50% chance of success because plaintiff would be battling "coincidence." Fisher advised Kawa to invite defendants to participate in facilitation, and if they refused, plaintiff would prevail in seeking indemnification.

In accordance with Fisher's advice, it was represented at the Le facilitation that Fisher would "act" as first chair although "[plaintiff] did not plan to try this case." Rather, plaintiff went into facilitation by putting "on our [sic] best game faces" to make it appear that the case would be settled or tried with Fisher acting as lead counsel. Although the insurance allotment for the case was $4.25 million, the case was settled for $3.4 million. With regard to the resolution, Kawa testified, "We were very pleased … nobody likes to pay that kind [of money] … but we were very pleased that we were able to negotiate down from 3.9 million dollars." Because of the extreme impairment to one of the Le twins, Kawa testified that, "[W]e were glad to make the case go away."

The parties presented conflicting evidence regarding the reasons for the settlement and the reasonableness of the settlement. Plaintiff continued to assert that the case was settled due to Dr. Abessinio's negligence, and the underlying allegations of nursing malpractice and negligent supervision were not "worked up" by counsel. Defendant presented witnesses who opined that the care rendered by Dr. Abessinio met the standard of care, which included eliciting testimony from the experts who had offered a defense of Dr. Abessinio in the underlying action.

Although the case was submitted to a jury for resolution, the trial court bifurcated the proceeding, allowing the jury to consider the claim for indemnification only. However, the jury rendered a verdict of no cause of action in favor of defendants. After the verdict, the trial court dismissed the contribution claim.

Plaintiff appeals as of right, alleging that the trial court erred in denying its motion for judgment notwithstanding the verdict (JNOV) or motion for new trial. A trial court's decision regarding a motion for a new trial is reviewed for an abuse of discretion. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). An abuse of discretion occurs when the trial court selects an outcome falling outside the range of principled outcomes. *Id*. The trial court is authorized to order a new trial when the verdict is against the great weight of the evidence, is

contrary to law, is the result of an error at law in the proceedings, or is the result of a mistake by the trial court. MCR 2.611(A)(1)(e), (g). The trial court has the duty to correct errors and has the opportunity to do so when ruling on a motion for a new trial. *Termaat v Bohn Aluminum & Brass Co*, 362 Mich 598, 602; 107 NW2d 783 (1961). The jury's verdict should not be set aside if there is competent evidence to support it because the trial court cannot substitute its judgment for that of the trier of fact. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999).

I. Joint and Several Liability

First, plaintiff alleges that the trial court erred by allowing defendants to submit the issue of joint and several liability of Dr. Mital to the jury. We disagree. Review of the brief filed on appeal reveals that plaintiff failed to submit authority addressing the application of joint and several liability with citation to authority. Rather, plaintiff makes a blanket assertion of error without any legal justification. "An appellant may not merely announce its position or assert an error and leave it to this Court to discover and rationalize the basis for its claims, unravel or elaborate its argument, or search for authority for its position." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 499; 668 NW2d 402 (2003). Additionally, the parties' factual dispute regarding the extent of the settlement and the affiliation agreement was submitted to the jury. Although plaintiff asserted that the only issue in the underlying medical malpractice action was the negligence of Dr. Abessinio, plaintiff's witnesses admitted that there were also allegations of nursing malpractice and negligent supervision. Application of disputed facts to the law present proper questions for the jury. *White v Taylor Distributing Co, Inc*, 482 Mich 136, 143; 753 NW2d 591 (2008). Accordingly, this claim of error does not provide plaintiff with relief.

II. Negligent Supervision

Plaintiff next alleges that the trial court erred by allowing defendants to argue negligent supervision. We disagree. The trial court's decision to admit evidence is reviewed for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). A court abuses its discretion when it admits evidence that is inadmissible as a matter of law. *Id*. Any error in the admission or exclusion of evidence does not warrant appellate relief unless refusal to take this action is inconsistent with substantial justice or affects a substantial right of the party. *Id*. citing 2.613(A); MRE 103(a).

Plaintiff alleged that agency principles precluded a claim of negligent supervision and that defendants failed to submit expert testimony to support a claim of negligent supervision. However, the claims raised by the parties involved indemnification and contribution arising from the parties' affiliation agreement. An indemnification contract is governed by the duties set forth in the contract. *Zahn v Kroger Co*, 483 Mich 34, 40; 764 NW2d 207 (2009). If the language of the contract is clear and unambiguous, the courts must enforce the plain meaning of the words chosen by the parties. *Id*. at 41. Review of the affiliation agreement reveals that defendant facility sent residents to plaintiff "for education and training," and each resident was sent for training and clinical experience as part of the academic curriculum. Dr. Abessinio testified that there was a hierarchy of responsibility, and all residents took direction from the attending physician. There were limitations on the activities that Dr. Abessinio could perform. She did not have the authority to admit a patient or administer drugs. Additionally, Dr. Robert Welch indicated that he would fault Dr. Mital in light of the fact that any decision to admit Mrs. Le as a

patient belonged to her, not Dr. Abessinio. In light of the rights and responsibilities of the parties as set forth in the affiliation agreement, and the application of the disputed facts to the law, *White, supra,* this claim of error is without merit.

III. Admission of Testimony of Dr. Robert Welch

Plaintiff contests the introduction of testimony by Dr. Welch, alleging that he contradicted previously available information. We disagree. The trial court's decision regarding admission of this evidence is reviewed for an abuse of discretion. *Craig, supra*. In light of the record established at trial, we cannot conclude that this issue has merit.

Review of the record reveals that plaintiff's witnesses testified regarding the merits of the underlying medical malpractice action, the likelihood of success, and the ability to defend the action. After receiving notice of the underlying medical malpractice case, plaintiff's representatives began to gather expert witnesses in defense of the action. McNelis, the attorney assigned to handle the malpractice case, testified that she utilized Dr. Welch as a standard of care expert. She testified that Dr. Welch initially expressed concern about providing a favorable opinion because he would have preferred that Mrs. Le be admitted in light of the bleeding and the fact that she was carrying twins. However, after McNelis reminded Dr. Welch that the case was based on the standard of care in effect in 1993, he agreed to provide an affidavit of meritorious defense.

Once this indemnification action was filed, the defense asked Dr. Welch to provide his opinion. However, after receiving notice that the case was settled in 2003, Dr. Welch destroyed his file based on the instructions from counsel and in accordance with federal law. To provide an opinion for this case, he reviewed the fetal monitoring strips, depositions, and hospital records, and his opinion regarding the defensibility of the case was consistent with the affidavit of meritorious defense filed in the underlying malpractice case.

Plaintiff contends that the testimony of Dr. Welch was contradictory, irrelevant, immaterial, and highly prejudicial. However, plaintiff fails to present evidence of the prior opinion by Dr. Welch and demonstrate that it contradicts evidence presented in this case. A party may not leave it to this Court to search for the factual basis to evaluate its position, but rather, must support its position with specific references to the record. *Begin v Michigan Bell Tel Co*, 284 Mich App 581, 590; 773 NW2d 271 (2009). More importantly, McNelis testified that Dr. Welch provided a favorable opinion for the underlying lawsuit and his opinion in this litigation was consistent. Therefore, the record does not support plaintiff's assertion.

IV. Verdict Form

Next, plaintiff submits that the verdict form submitted to the jury should have allocated liability among potential sources of exposure. We disagree. Whether a special verdict may be submitted to the jury presents a discretionary issue for the trial court. *In re Portus*, 142 Mich App 799, 803-804; 371 NW2d 871 (1985). A jury's verdict will be upheld when there is an interpretation of the evidence that provides a logical explanation for the jury verdict. *Moore v Secura Ins*, 482 Mich 507, 518; 759 NW2d 833 (2008).

In cases involving contractual indemnity, each case must be resolved by the contract terms to which the parties have agreed. *Grand Trunk Western Railroad, Inc v Auto Warehousing Co*, 262 Mich App 345, 351; 686 NW2d 756 (2004). If an indemnitor has notice of an action and declines the opportunity to defend it, the indemnitor will be bound by any reasonable good faith settlement that the indemnitee might make. *Id*. at 353. However, the language of the contract governs the extent of the duty to indemnify. The indemnitee need only demonstrate potential liability and that the settlement amount was reasonably related to the liability exposure and the employees. *Id*. at 353, 358-359. When examining the reasonableness of the settlement, the trier of fact must examine the amount paid in settlement of the claim in light of the risk of exposure. *Ford v Clark Equipment Co*, 87 Mich App 270, 277-278; 274 NW2d 33 (1978).[1] The risk of exposure must be balanced against the possibility that the original defendant would have prevailed. *Id*. The fact that the claim may have been successfully defended by establishing contributory negligence, lack of negligence, or other applicable defense is part of the reasonableness analysis and subject to proof. *Id*. at 278.

Therefore, when an indemnification is based on an underlying settlement, the claim may be successfully defended by a showing of contributory negligence or lack of negligence. *Ford, supra*. The trier of fact must consider the reasonableness of the settlement in light of the amount paid and the risk of exposure. *Grand Trunk, supra*; *Ford, supra*. In the present case, the defense presented evidence that Dr. Abessinio complied with the 1993 standard of care. Defendants also presented evidence that plaintiff's settlement may have been premised on other factors unrelated to their conduct or the affiliation agreement. Specifically, plaintiff had recently paid a $55 million dollar verdict in a single birth case, the damages to the twins as evidenced by a videotape, and the lack of supervision. The verdict form at issue required the jury to determine what percentage of the settlement amount was attributable to Dr. Abessinio. The fact that the jury may have found nursing negligence or a lack of supervision by Dr. Mital is not a necessary element of indemnification involving these defendants. Therefore, the challenge to the verdict form is without merit, and the trial court's submission did not constitute an abuse of discretion. *Portus, supra*.

V. Great Weight of the Evidence

We cannot conclude that this issue has any merit. Review of plaintiff's brief on appeal reveals that it does not submit an analysis of the proofs that were submitted at trial. Rather, plaintiff's brief contains a recitation of the procedural aspects of the case, specifically, the trial court's pre-trial rulings. Consequently, we cannot analyze this issue as plaintiff failed to sufficiently brief the issue. *Wiley, supra*.

VI. Contribution Claim

[1] The *Grand Trunk* Court found that the *Ford* decision was confusing and redundant and disapproved of the decision if it could be read to require more than potential liability and a settlement amount reasonably related to the liability exposure. *Grand Trunk, supra* at 356, 359.

Plaintiff contends that the trial court erred in bifurcating the contribution claim and failing to submit the issue to the jury. We disagree. Contribution is a partial payment made by each or any of jointly or severally liable tortfeasors who owe a common liability to an injured party. *St. Luke's Hosp v Giertz*, 458 Mich 448, 453-454; 581 NW2d 665 (1998). Contribution distributes the loss among all tortfeasors. *Id*. A hospital may be held vicariously liable for the acts of its agents. *Nippa v Botsford Gen Hosp (On Remand)*, 257 Mich App 387, 390; 668 NW2d 628 (2003).

In the present case, the jury concluded that Dr. Abessinio was not negligent when reaching the issue of indemnification. Contribution requires distribution among all tortfeasors. The jury expressly concluded that Dr. Abessinio was not a tortfeasor. Therefore, plaintiff was not entitled to contribution from her or from the hospital based on vicarious liability. Therefore, the trial court did not err in bifurcating the proceedings and ruling on the issue as a matter of law.

VII. The Opening Statement

"Whether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion resulting in a miscarriage of justice." *Veltman v Detroit Edison Co*, 261 Mich App 685, 688; 683 NW2d 707 (2004), quoting *Persichini v William Beaumont Hosp*, 238 Mich App 626, 635; 607 NW2d 100 (1999). "A mistrial should be granted only when the error prejudices one of the parties to the extent that the fundamental goals of accuracy and fairness are threatened." *Veltman, supra* at 690-691 quoting *In re Flury Estate*, 249 Mich App 222, 229; 641 NW2d 863 (2002). When the trial court concludes that the jury was not affected by any comments, and the trial court provides an instruction that the comments and remarks were not evidence, a mistrial is not warranted. *Veltman, supra* at 691.

The trial court addressed plaintiff's objections during the opening statement, admonished counsel for the defense, and provided an instruction. When addressing the issue in the context of the motion for new trial, the court held that there was no indication that the jury disregarded its instructions and there was no evidence of prejudice. In light of the trial court's instructions and the ruling regarding the motion for new trial, we cannot conclude that the trial court abused its discretion. *Veltman, supra*.[2]

VIII. Coverage Agreement

[2] We note that plaintiff raises an issue alleging that the trial court erred in allowing defendants to criticize legal strategies. However, review of the substance of the argument reveals that it alleges that the trial court erred in its admission of evidence by allowing plaintiff's witnesses to testify regarding the actions taken before settlement and the trial court's failure to decide the issues as a matter of law. In light of the fact that the plaintiff failed to raise these issues in the statement of questions presented, they are waived. *English v Blue Cross Blue Shield*, 263 Mich App 449, 459; 688 NW2d 523 (2004). Moreover, the issue as stated by plaintiff is not supported by the record.

The trial court did not abuse its discretion regarding admission of this document. It was relevant to determine if Dr. Abessinio was working within the course of her scheduled employment or was working as a "moonlighter" at the time of the treatment. *Craig, supra*. In any event, plaintiff failed to demonstrate that the ruling was inconsistent with substantial justice or affected a substantial right. *Id*.

IX. Defense Counsel as a Witness

The decision to admit or exclude evidence is reviewed for an abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). "[I]t is well settled that in order to preserve the issue of the admissibility of evidence for appeal, the proponent of evidence excluded by the trial court must make an offer of proof." *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 291; 730 NW2d 523 (2006). "[A]n offer of proof 'serves the dual purpose of informing the trial court of the nature and purpose of the evidence sought to be introduced, and of providing a basis for the appellate court to decide whether to sustain the trial court's ruling.'" *Id*. (further citation omitted); see also MRE 103(a)(2).

After the trial court ruled regarding excluding defense counsel as a witness, there is no indication that plaintiff provided an offer of proof or requested the opportunity to make a separate record with defense counsel's testimony. Rather, plaintiff concludes, without citation to legal authority or specifics, that the testimony of defense counsel was crucial to the trial. A request for indemnity based on an underlying settlement agreement requires inquiry into whether the settlement was reasonable and made in good faith. *Grand Trunk, supra*. Defense counsel's evaluation is irrelevant to that point. Rather, the opinions from plaintiff's counsel and risk managers in the underlying action were far more relevant to the issues. In light of the failure to make an offer of proof and the failure to sufficiently brief the issue, *Wiley, supra*, this issue does not have merit.

Affirmed.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Pat M. Donofrio